COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of New England Power Company for Approval of the Divestiture of the Seabrook Nuclear Power Station	)	D.T.E. 02-33
Petition of Canal Electric Company, Cambridge Electric Light Company and Commonwealth Electric Company for Approval Relating to the Divestiture of the Seabrook Nuclear Power Station	)	D.T.E. 02-34
The Connecticut Light and Power Company	)	D.T.E. 02-35

REPLY BRIEF OF FPL ENERGY SEABROOK, LLC

FPL Energy Seabrook, LLC ("FPLE Seabrook") submits this Reply Brief in support of (a) the petitions of New England Power Company ("NEP") and Canal Electric Company ("Canal"), Cambridge Electric Light Company ("Cambridge"), and Commonwealth Electric Company ("Commonwealth"; together with Canal and Cambridge, "NSTAR") for approval from the Department of the sale of NEP's and Canal's respective interests in the Seabrook Nuclear Station ("Seabrook"); and (b) the petitions of NEP, NSTAR and the Connecticut Light and Power Company ("CL&P") (collectively, the "Petitioners") for eligible-facility determinations pursuant to § 32(c) of the Public Utility Holding Company Act of 1935 ("PUHCA").

As FPLE Seabrook and the Petitioners demonstrated in their initial briefs, the record overwhelmingly supports approval of the Seabrook sale and related § 32(c) findings. NEP and

Canal will be receiving the highest price for their Seabrook shares, as determined by a fair and open auction. Section 32(c) findings – for all of the Petitioners, including CL&P – are warranted, inasmuch as the Seabrook sale will benefit consumers, is in the public interest, and does not violate Massachusetts law.

Ignoring the virtually undisputed record, the Office of the Attorney General (by letter dated July 31, 2002 (the "AG Brief")) opposes the Petitioners' requests. As shown below, the Attorney General's objections are unfounded and self-contradictory. If they were to be adopted by the Department, they would threaten to deprive Massachusetts customers of the benefits of the Seabrook sale.

I. FPLE SEABROOK WILL BE PAYING NEP AND CANAL THE HIGHEST PRICE OFFERED FOR THEIR SEABROOK SHARES IN AN OPEN, COMPETITIVE AUCTION.

It is beyond dispute that, should the Department grant the relief sought by the Petitioners, NEP and Canal will receive the highest price offered by any bidder in the Seabrook auction. The proceeds from that sale will translate into significant and demonstrable customer benefits, ranging from lower transition costs to the elimination of future liability for decommissioning the Seabrook facility.

The Attorney General nevertheless objects to approval of the sale, contending that it is "implicit" that FPLE Seabrook "reduced the overall purchase price to compensate for the fact that New Hampshire, by itself, would share in any excess decommissioning funds." AG Brief at 3. The evidence cited by the Attorney General does not support this assertion. To the contrary, the record shows that FPLE Seabrook paid a premium in excess of the sum of the value of all of the participating owners' shares to obtain control of Seabrook upon closing of the sale. NEP and Canal will share in that premium only if the Department grants the relief sought by the

Petitioners. See Tr. 51-56, 119-120. The record also shows that NEP and Canal potentially could lose that premium should the Department impose conditions on the sale that go beyond those provided in the PSA. See Tr. at 128. That would be, in the words of NEP's and Canal's witnesses, "a bad result" for NEP's and Canal's customers. Tr. at 134-36, 138-39. That result should and can be avoided by approval of the petitions without any added conditions.

II. THE SALE OF NEP'S AND CANAL'S SHARES, ON THE TERMS SET FORTH IN THE PSA, IS IN THE PUBLIC INTEREST. THE PSA'S TREATMENT OF EXCESS DECOMMISIONING FUNDS SHOULD NOT BE MODIFIED.

A. The Seabrook Auction Ensured Complete, Uninhibited, Non-Discriminatory Access by All Parties Seeking to Participate in the Sale, and Thus Met the Requirements of the Restructuring Act.

The parties in these proceedings – including the Attorney General – agree that the Restructuring Act mandates a fair divestiture process. The parties further agree that the operative legal standard is that the process "will be deemed both equitable and structured to maximize the value of the existing generating facilities being sold if the company establishes that it used a 'competitive auction or sale' that ensured 'complete, uninhibited, non-discriminatory access to all data and information by any and all interested parties seeking to participate in such auction or sale.'" Western Massachusetts Electric Company, D.T.E. 00-68, at 6 (2001), quoting c.164, § 1 A(b)(2).

The AG Brief implies that the Seabrook auction did not meet the Restructuring Act's requirements because (a) NEP and NSTAR were "excluded from direct involvement in the auction process and bidder negotiations," see AG Brief at 2; and (b) [t]he Department did not have any input into the auction process," id. Apart from its lack of record support,[1] this

[1] NEP and NSTAR assuredly participated in the auction process. See, for example, Exh. NEP-2 at 6-9, 11-13 (Dabbar Testimony). They also had a role in negotiation of the PSA. NEP and Canal voluntarily entered into an agreement that allowed NEP and Canal to join a "negotiating committee" of the selling Seabrook owners. The

argument mischaracterizes the thrust of the Restructuring Act. The Act focuses properly on maximizing the competitiveness of the auction process and the encouragement of full participation of interested bidders in asset auctions. It does not impose participation requirements on the selling utilities (or the Department, for that matter). See, for example, Western Massachusetts Electric Company, D.T.E. 00-68 at 10 (auction that provides "complete, uninhibited, non-discriminatory access to all data and information by bidders" meets Act's requirements); Boston Edison Company/ Commonwealth Electric Company, D.T.E. 98-119/126, 16-18 (1999) (same); Boston Edison Company, D.T.E. 97-113, at 9-11 (1998) (same). As shown in FPLE Seabrook's and the Petitioners' initial briefs, the Seabrook auction maximized the participation of interested bidders through the use of procedures approved by the Department in numerous divestiture transactions. Demonstrably, that process yielded a high bid and a great result for ratepayers.

B. FPLE Seabrook's Assumption of Decommissioning Liabilities and Funds is Fair to NEP's and Canal's Massachusetts Customers.

The record firmly establishes that, upon closing, FPLE Seabrook will assume all of NEP's and Canal's substantial responsibilities and liabilities for decommissioning Seabrook. See, for example, Exh. NEP-1, at 10-11 (Schwenessen Testimony); Exh. NEP-3 (PSA, § 2.3(e): FPLE Seabrook assumes "all liabilities in respect of (i) the Decommissioning of the Facility…and (iii) any other decommissioning or post-operative disposition of the Facility or any other Acquired Assets."). NEP's and Canal's customers will no longer be subject to substantial investment risk (associated with ensuring the full funding of their decommissioning obligations,

committee provided input to representatives of the sellers who conducted face-to-face negotiations with FPLE Seabrook. Tr. at 123-24. Such "coordinated" negotiations have been a common, unobjectionable feature of other auctions found by the Department as meeting the requirements of the Restructuring Act. See, for example, Western Massachusetts Electric Company, D.T.E. 00-68 at 8-11 (Millstone sale).

see Tr. at 51), regulatory risk, see Tr. at 57, or the risk that the expense of decommissioning will exceed the amount of available decommissioning funds.

The PSA's terms concerning the assumption of the selling owners' decommissioning liabilities and their decommissioning fund balances were part of the prototype documents upon which FPLE Seabrook and other bidders based their bids. Those documents contemplated the return of any excess decommissioning funds to only one group of ratepayers – those who are customers of the New Hampshire owners of Seabrook – and under only one set of circumstances: those described in N.H.R.S.A. 162-F:21-b (II)(c). That statute defines as "excess" the amount by which New Hampshire customer contributions to the Seabrook nuclear decommissioning fund (see N.H.R.S.A. 162-F:19), as of the date of transfer of Seabrook ("including interest and earnings as of the date of ownership transfer"), exceed the actual cost of decommissioning.

The prototype terms were material to FPLE Seabrook's bid. See Tr. at 128. They also were based on considerations of fundamental fairness: since FPLE Seabrook will bear all of the liabilities and risks of decommissioning, including the risk that the funds will not be sufficient to complete decommissioning, it is entitled to own the funds outright, including any funds that may remain after completion of decommissioning. Id.[2] Thus, FPLE Seabook assumes both the potential costs and the benefits associated with this risk, and ratepayers are relieved of all risk. Subsequent amendments to the prototype PSA's excess-decommissioning terms, which are found in the final version of the PSA at § 5.10(h), did not alter this linkage of risk and reward. Section 5.10(h) requires return of customer contributions only to the extent required by law. R.S.A. 162-F:21-b (II)(c) has no counterpart in Massachusetts law. See Tr. at 32-34.

[2] FPLE Seabrook will own the Decommissioning Funds outright as of the date of closing. See, for example, Exh. NEP-3 (PSA, § 2.1(m): FPLE Seabrook assumes "all of the Sellers' right, title, and interest in the assets

The Attorney General suggests that the Department nevertheless should condition its approval of the Seabrook transaction, to require FPLE Seabrook to give NEP's and Canal's Massachusetts customers the benefit of New Hampshire law. See AG Brief at 1; see also id. at 2-3.[3] The Department should reject the Attorney General's invitation. The Department's observations in Boston Edison Co., D.T.E. 98-119/126, when confronted with a similar request to condition its approval on modifications to the decommissioning terms of the purchase and sale agreement for the Pilgrim nuclear plant, are on point:

> To implement the Attorney General's proposal to condition the approval of the divestiture transaction on the contingent liability of Entergy Holding for any future decommissioning shortfall, the Department would, in effect, be restructuring the divestiture transaction. Entergy's bid is the product of a competitive process, and to condition the sale on a guarantee by the parent company would change the bargained-for terms of the transaction. The Restructuring Act's divestiture provisions are grounded in the premise that a fair and open market-test is a better determinant of asset value than an administrative determination. We have had such a test for Pilgrim. Only upon the most compelling showing would the Department supplant the results of a market-test.

The Attorney General's showing in this case falls far short of that "most compelling showing" required by Boston Edison.[4] The Department should not condition its approval of the sales of NEP's and Canal's interests in Seabrook upon a particular outcome regarding the treatment of excess decommissioning funds or any modification to the terms of the Seabrook PSA.[5]

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comprising the Decommissioning Funds as of such Closing Date, including, without limitation, those items identified on Schedule 2.1(m) including all income, interest, and earnings accrued thereon….").

[3] At page 3 of its brief, the Attorney General appears to take a somewhat different position on what is necessary to obtain "fairness" for Massachusetts customers, arguing that Massachusetts customers "should be granted the same treatment as the customers of New Hampshire or Connecticut, whichever group is most advantaged." FPLE Seabrook interprets the Attorney General's criticisms as limited to the issue of excess decommissioning funds, as the Attorney General has pointed to no other purported customer benefit in his brief.

[4] The Attorney General's reliance on Western Massachusetts Electric Company, D.T.E. 01-99 (2002) in support of his position on excess decommissioning is misplaced. There the Department ratified a voluntary agreement by the purchaser of WMECO's interests in the Vermont Yankee nuclear facility to share a portion of its excess decommissioning funds with the selling Massachusetts owners of the facility. There is no such agreement here.

[5] The Attorney General's request that the Department require Massachusetts ratepayers be given the "same treatment as the customers of New Hampshire and Connecticut, whichever group is most advantaged " raises a plethora of legal issues. As the AG Brief notes at page 2, the funds themselves – which are located outside of

III. THE ATTORNEY GENERAL'S "STAGED CLOSING" PROPOSAL HAS NO MERIT.

In a single sentence at the end of his letter, the Attorney General proposes that the Department prevent "staged closings" -- which are expressly permitted by the PSA -- that might omit NEP or Canal from the sale.[6] There is no authority cited for this attempt to alter the terms of the PSA because there is no such authority. By this argument, the Attorney General implicitly recognizes that Massachusetts customers could lose a premium price for the sale of Seabrook interests should NEP and Canal not close with FPLE Seabrook. The irony in the Attorney General's position is that the only thing that would threaten NEP's and Canal's ability to close simultaneously with the non-Massachusetts Seabrook owners is an order such as that advocated by the Attorney General that imposes material adverse conditions on the sale of NEP's and Canal's Seabrook interests. Given the obvious benefits of this transaction to Massachusetts ratepayers, FPLE Seabrook urges that the transaction be approved promptly and without added conditions, so that all of the closings can occur simultaneously and without delay.

CONCLUSION

For these reasons, as well as those set forth in its initial brief, FPLE Seabrook respectfully requests that the Petitions for the sale of Seabrook be approved and that the Department make specific determinations that allowing Seabrook to become an eligible facility,

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Massachusetts -- are subject to federal jurisdiction. See 18 C.F.R. 35.32, 35.33 (2001). FERC's regulations specifically address the disposition of excess decommissioning funds. See 18 C.F.R. 35.32(a)(7). Such regulations have been held to preempt state regulation of the funds. See, for example, Maine Yankee Atomic Power Co. v. Maine Pub. Util. Comm'n, 581 A.2d 799, 805-806 (1990), cert. denied 501 U.S. 1230 (1991).

[6] The Attorney General is not clear about how the Department could accomplish this result. The Department has no direct jurisdiction over the non-Massachusetts Seabrook owners, and holds indirect jurisdiction over CL&P's ability to sell its Seabrook interest only by virtue of PUHCA. The Attorney General's reason for why the Department should withhold a § 32(c) finding from CL&P – that it should not benefit "at the expense of Massachusetts ratepayers" – has no support in the record. The Attorney General has not identified any Massachusetts-ratepayer expense associated with CL&P's sale of its Seabrook interest to FPLE Seabrook.

as defined in § 32 of PUHCA, will benefit consumers, is in the public interest, and does not violate state law.

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CERTIFICATION

I hereby certify that a copy of the foregoing was mailed via first-class mail, postage pre-paid, to all counsel and parties of record, on this ___th day of August 2002.

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Sean K. McElligott

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